RECORD, CASE No. 15,217.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1247.

EDWARD H. HORNER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1892.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, in the United States of America, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Edward H. Horner, plaintiff in error, and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Edward H. Horner, plaintiff in error, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 29th day of July, 1892, that, the record and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of July, in the year of our Lord one thousand eight hundred and ninety-two,
2 and of the Independence of the United States the one hundred and seventeenth.

[L. S.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

CHAS. L. BENEDICT.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from one (1) to thirty-three (33), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Edward H. Horner, plaintiff in error, against The United States of America, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district

of New York, in the second circuit, this twenty-ninth day of July, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

[L. S.] JOHN A. SHIELDS, *Clerk.*

(Endorsed:) The U. S. circuit court of appeals for the second circuit. Edward H. Horner, plaintiff in error, *vs.* The United States, defendant in error. Writ of error. Alfred Taylor, Herman Aaron, attorneys for plaintiffs in error. Due service of a copy of the within writ of error is hereby admitted this 14th day of July, 1892. Edward Mitchell, attorney for defendant in error. U. S. circuit court. Filed July 14, 1892. John A. Shields, clerk.

3 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Monday, the 16th day of May, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Charles L. Benedict, judge.

The grand jury comes into court and, being called, they severally answer to their names.

They present the following bill of indictment:

THE UNITED STATES *vs.* EDWARD H. HORNER. } § 3894 as amended. Mailing and causing to be mailed a circular concerning a lottery.

4 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held in the city of New York within and for the district and circuit aforesaid, on the second Wednesday of May, in the year of our Lord one thousand eight hundred and ninety-two, and continued by adjournment to and including the sixteenth day of May, in the year of our Lord one thousand eight hundred and ninety-two.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid on their oath present that Edward H. Horner, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-ninth day of December, in the year of our Lord one thousand eight hundred and ninety-one, at the southern district of New York and within the jurisdiction of this court, did unlawfully and knowingly then and there cause to be deposited in the post office at the city of New York, in the State of New York, in the aforesaid district, a certain circular to be conveyed and delivered by mail, which said

circular in the contents thereof hereinafter set forth concerned a lottery and which was then and there addressed to Joseph Ehrman, 70 Dearborn street, Chicago, Illinois, and was enclosed in an envelope with postage thereon prepaid and carried by mail,
5 and which said circular contained, among other things, the following, to wit:

"Banking-house of E. H. Horner, No. 88 Wall street.

NEW YORK, *December* 27, 1890.

"110th redemption, December 1st, 1890, at Wein. The following 26 series were called in:

"Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.
"121	36	20,000	1369	24	24,400	2666	63	400
"271	75	400		46	400		84	400
"280	22	1,000	1792	19	400	2988	2	400
"	65	400	1970	16	2,000		10	400
"461	37	400		69	400		48	50,000
"481	54	400		70	5,000		88	400
"	72	10,000	3288	28	400	3195	44	5,000
"487	69	400	2412	53	400		50	400
"493	6	400		74	400	3238	14	5,400
"684	14	400		82	400		52	400
"	76	400	2483	36	400	3486	35	400
"	94	400	2526	72	400	3685	39	400
"815	70	400		82	400		81	400
"	82	400	2531	44	400	3969	4	400
"853	23	400		91	1,000		14	400
"	61	400	2666	3	400		50	400
"	81	400		18	2,000			400

All other bonds contained in the above twenty-six series not specially mentioned therein are redeemed with fl. 200.

Payment on and after March 1, 1891.

The next report of redemption will be published in the second half of the month of January, 1891.

Customers who have been notified by special letter of the redemption of their bonds can cash the respective amounts at my office."

That the said words and figures of the said circular relate to and concern certain so-called bonds issued by the Empire of Austria and state on which of said so-called bonds payments were to be
6 made and the amount thereof, a translation of the face of one of such bonds, so called, being as follows, to wit:

Series 921. 100 florins. Number 60.

Premium Bonds.

"One hundred florins, Austrian standard, as share of the loan of forty million florins, Austrian standard, made according to the law of November 17th, 1863 (law journal of the empire, No. 98), for which resulting according to the plan of redemption will be paid to

the bearer by the Universal State Loan Treasury, Vienna, February 11th, 1864.

" (Signed) JOSEPH RUDDE,
" [COAT OF ARMS.] " *Imperial Royal Minister Counsellor.*
" PLENER,
" *Imperial Royal Minister of Justice.*

" For the board for controlling the State loans:
" (Signed) COLLERDO MANNSFELDT.
" (Signed) WINTERSTEIN.

" For the Imperial Royal Universal State Loan Treasury:
" (Signed) WINTER.
" (Signed) SCHIMKOWSKY."

Each of said so-called bonds having upon its face a series number and a number in the series, the amount of indebtedness which each of said so-called bonds purports to evidence being one hundred florins, the plan of drawing set forth on the back of each of said so-called bonds showing that up to April, 1874, there were to take place five drawings a year on dates therein mentioned to determine on which of the so-called bonds payments should be made and the amounts of such payments, and that thereafter and until the end of the nineteenth year after the date of the issue of the so-called bonds, four drawings per year were to take place at stated
7 dates for the same purpose, and that thereafter, to and including the thirty-first year, three drawings were to take place for the same purpose, at fixed dates for each year, and that thereafter, to and including the fifty-fifth year after the date of issue of such so-called bonds, two drawings per year were to take place, for the same purpose, at the end of which time all of said so-called bonds were, according to the plan aforesaid, to be repaid, and according to said plan the smallest amount to be paid for any of such so-called bonds selected for payment during the first year after issue was one hundred and thirty-five gulden, during the second year one hundred and forty gulden, and during the third year one hundred and forty-five gulden, and so on, increasing in amount five gulden each year until the amount should reach two hundred gulden, which amount then remained fixed as the minimum sum to be paid for any of the so-called bonds, the payment of which should be determined by the drawings aforesaid, guldens and florins being denominations of money of the same value, under the said plan other larger amounts being provided to be paid on certain of the so-called bonds to be determined by the drawings, thus during the first year the following sums being, according to said plan, to be paid on certain so-called bonds to be determined by such drawings, to wit:

On one bond	250,000 gulden
On one bond	25,000 gulden
On one bond	15,000 gulden
On one bond	10,000 gulden

On 2 bonds, each at 5,000 gulden	10,000 gulden
On 3 bonds, each at 2,000 gulden	6,000 gulden
On 6 bonds, each at 1,000 gulden	6,000 gulden
On 15 bonds, each at 500 gulden	7,500 gulden
On 30 bonds, each at 400 gulden	12,000 gulden

And during subsequent periods other provision being made for such larger amounts, all of said so-called bonds being in the
8 same form as said copy translation and having the same drawing and redemption plan endorsed upon them and being identical in all respects, except that the series numbers and the number thereof vary as to each so-called bond, all of the drawings heretofore referred to by which, first, are determined the series of the so-called bonds to be paid or redeemed in each year, and, second, are determided the particular bonds in the series whose holders shall be entitled to the larger sums aforesaid, the numbers of which are drawn from the wheel, being conducted in such a way as that the determination of the numbers, both for redemption and for amounts, is wholly by lot or chance, the holder of each so-called bond having an equal chance with the holder of every other so-called bond, first, in securing an early payment of his so-called bond, and, second, in securing as a so-called payment for his so-called bond the very large prizes to which reference has been hereinabove made, the result in each case, as before alleged, being dependent wholly on lot or chance; all of which was done by said defendant and against the peace of the United States of America and their dignity and contrary to the form of the statute of the United States in such case made and provided.

Second Count.

And the jurors aforesaid, on their oath aforesaid, do further present that Edward H. Horner, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-ninth day of December, in the year of our Lord one thousand eight hundred and ninety-one, at the southern district of New York and within the jurisdiction of this court, unlawfully and knowingly then and there deposited in the post office at the city of New York, in the State of New York, in the aforesaid
9 district, a certain circular to be conveyed and delivered by mail, which said circular in the contents thereof hereinafter set forth concerned a lottery and which was then and there addressed to Joseph Erhman, 70 Dearborn street, Chicago, Illinois, and was enclosed in an envelope with postage thereon prepaid and carried by mail, and which said circular contained, among other things, the following, to wit:

"Banking-house of E. H. Horner, No. 88 Wall street.

NEW YORK, *December* 27, 1890.

"110th redemption, December 1, 1890, at Wein. The following 26 series were called in:

"Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.
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"481	54	400		70	5,000		88	400
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"684	14	400		82	400		52	400
"	56	400	2483	36	400	3486	35	400
"	94	400	2526	72	400	3685	39	400
"815	70	400		82	400		81	400
"	82	400	2531	44	400	3969	4	400
"853	23	400		91	1,000		14	400
"	61	400	2666	3	400		50	400
"	81	400		18	2,000			400

All other bonds contained in the above twenty-six series not specially mentioned therein are redeemed with fl. 200.

Payment on and after March 1, 1891.

The next report of redemption will be published in the second half of the month of January, 1891.

Customers who have been notified by special letter of the redemption of their bonds can cash the respective amounts at my office."

That the said words and figures of the said circular relate to and concern certain so-called bonds issued by the Empire of Austria and state on which of said so-called bonds payments were to be made and the amount thereof, a translation of the face of one of such bonds, so called, being as follows, to wit:

Series 921. 100 florins. Number 60.

Premium Bonds.

"One hundred florins, Austrian standard, as share of the loan of forty million florins, Austrian standard, made according to the law of November 17, 1863 (Law Journal of the Empire No. 98), for which resulting according to the plan of redemption will be paid to the bearer by the Universal State Loan Treasury.

Vienna, February 11, 1864.

(Signed) JOSEPH RUDDE,
Imperial Royal Minister Counsellor.

[COAT OF ARMS.] PLENER,
Imperial Royal Minister of Justice.

For the board for controlling the state loans:
(Signed) COLLERDO MANNSFELDT.
(Signed) WINTERSTEIN.

For the Imperial Royal Universal State Loan Treasury:
(Signed) WINTER.
(Signed) SCHIMKOWSKY."

Each of said so-called bonds having upon its face a series number and a number in the series, the amount of indebtedness which each of said so-called bonds purports to evidence being one hundred florins, the plan of drawing set forth on the back of each of said so-called bonds showing that up to April, 1874, there were to take place five drawings a year, on dates therein mentioned, to determine on which of the so-called bonds payments should be made, and the amounts of such payments, and that thereafter and until the end of the nineteenth year after the date of the issue of the so-called bonds, four drawings per year were to take place at stated dates for the same purpose, and that thereafter to and in-
11 cluding the thirty-first year, three drawings were to take place for the same purpose at fixed dates for each year, and that thereafter to and including the fifty-fifth year after the date of issue of such so-called bonds two drawings per year were to take place for the same purpose, at the end of which time all of said so-called bonds were according to the plan aforesaid to be repaid; and according to said plan the smallest amount to be paid for any of such so-called bonds selected for payment during the first year after issue was one hundred and thirty-five gulden, during the second year one hundred and forty gulden, and during the third year one hundred and forty-five gulden, and so on, increasing in amount five gulden each year until the amount should reach two hundred gulden, which amount then remained fixed as the minimum sum to be paid for any of the so-called bonds, the payment of which should be determined by the drawings aforesaid, guldens and florins being denominations of money of the same value; under the said plan other larger amounts being provided to be paid on certain of the so-called bonds to be determined by the drawings, thus during the first year the following sums being according to said plan to be paid on certain so-called bonds to be determined by such drawings, to wit:

On one bond	250,000	gulden
On one bond	25,000	gulden
On one bond	15,000	gulden
On one bond	10,000	gulden
On 2 bonds, each at 5,000 gulden	10,000	gulden
On 3 bonds, each at 2,000 gulden	6,000	gulden
On 6 bonds, each at 1,000 gulden	6,000	gulden
On 15 bonds, each at 500 gulden	7,500	gulden
On 30 bonds, each at 400 gulden	12,000	gulden

And during subsequent periods other provision being made for such larger amounts, all of said so-called bonds being in the same

form as said copy translation, and having the same drawing and redemption plan endorsed upon them and being identi-
12 cal in all respects except that the series numbers and the number thereof vary as to each so-called bond, all of the drawings heretofore referred to by which, first, are determined the series of the so-called bonds to be paid or redeemed in each year, and, second, are determined the particular bonds in the series whose holder shall be entitled to the larger sums aforesaid, the numbers of which are drawn from the wheel, being conducted in such a way as that the determination of the numbers, both for redemption and for amounts, is wholly by lot or chance, the holder of each so-called bond having an equal chance with the holder of every other so-called bond, first, in securing an early payment of his so-called bond, and, second, in securing as a so-called payment for his so-called bond the very large prizes to which reference has been hereinabove made, the result in each case, as before alleged, being dependent wholly on lot or chance; all of which was done by said defendant and against the peace of the United States of America and their dignity and contrary to the form of the statute of the United States in such case made and provided.

EDWARD MITCHELL,
U. S. Attorney.

(Endorsed:) Filed in open court the 16th May, 1892. May 17th, 1892, the defendant arraigned and indict. read. Def't pleads not guilty. May 24, 1892, the defendant tried. Verdict, guilty. May 24, 1892, sentenced to pay a fine of one hundred dollars ($100). May 24, 1892, motion made by def't's counsel and granted for stay in which to make and serve bill of exceptions. Taylor & Parker, Alfred Taylor, Herman Aaron, for def't. U. S. circuit court. The United States of America *vs.* Edward H. Horner. Indictment, mailing and causing to be mailed a circular concerning a lottery. U. S. Rev. St., § 3894, as amended by I. Suppl. R. S., 2d ed., 803. Edward Mitchell, U. S. district attorney. A true bill. H. O. Armour, foreman. Filed May 16, 1892.

13 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the 17th day of May, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Charles L. Benedict, judge.

THE UNITED STATES
vs.
EDWARD H. HORNER. } § 3894, as Amended.

On motion of the United States attorney, ordered arraignment. The defendant on being arraigned pleads not guilty.
(Trial set down for the 24th inst.)

14 At a stated term of the circuit court of the United States of America for the southern district of New York, in the sec-

ond circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the 24th day of May, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Hon. Charles L. Benedict, judge.

THE UNITED STATES
vs.
EDWARD H. HORNER. } § 3894, as Amended.

On motion of United States attorney, ordered trial; the defendant present.

Jurors sworn:

James T. Barrow.	Henry J. Ahrens.
Maurice Seligmann.	Goold H. Redmond.
Ogden D. Budd.	Jacob S. Bleyer.
Samuel Ross.	John Colby.
Edward W. Currier.	Herman Tappan.
Joseph A. Sterling.	Horace Winans.

Mr. Maxwell Evarts, assistant U. S. Attorney, opens cause in behalf of prosecution.

Evidence for Prosecution.

SIDNEY S. HARTSHORNE, JR., sworn.

Motion made by Alfred Taylor, defendant's counsel, that court direct jury to render a verdict of acquittal.

Motion denied. Exception.

15 The jury thereupon say that they find the defendant guilty of the charges in the indictment contained, and so say they all.

Stay granted defendant's attorney in which to make and serve bill of exceptions.

On motion of the United States attorney—

Ordered sentence.

The court thereupon proceeds to pass judgment and sentence the defendant, Edward H. Horner, to pay a fine of one hundred dollars ($100).

United States Circuit Court for the Southern District of New York.

UNITED STATES
vs.
EDWARD H. HORNER.

The defendant above named was indicted at a stated term of the circuit court of the United States for the southern district of New York for a violation of section 3894, Revised Statutes of the United States, as amended by the act of Congress approved September 19, 1890. The indictment appears in the record.

The defendant was arraigned on the seventeenth day of May, one

thousand eight hundred and ninety-two, and pleaded not guilty; and afterwards, to wit, on the 24th day of May, one thousand eight hundred and ninety-two, the issue aforesaid joined on said
16 indictment by said plea of not guilty came on duly to be tried before the Hon. Charles L. Benedict and a jury.

The United States were represented by Maxwell Evarts, assistant United States attorney, and the defendant was represented by his counsel, Alfred Taylor and Herman Aaron.

In the course of the trial and before the rendering of the verdict thereon the said counsel for the defendant did take and allege sundry exceptions to the rulings of the court and to the refusal of the court to direct the jury to acquit and dismiss the prosecution; which said exceptions are hereinafter set forth.

To maintain the said issues on the part of the United States S. S. HARTSHORN, JR., who, being first duly sworn and examined by Mr. EVARTS on behalf of the United States, testified:

I am a post-office inspector and have been for six or seven years. The defendant in this case admitted to me that he deposited the circular now shown me in the mail on the 29th day of December, 1889, addressed to Joseph Ehrmann, 70 Dearborn street, Chicago, Illinois. He admitted to me that that circular related to the bond which is now handed to me, and that that bond was a bond of the Empire of Austria.

The circular referred to is offered and received in evidence, marked Exhibit Number 1, and the bond above mentioned is offered and received in evidence and marked Exhibit Number 2.

The defendant admitted to me that each of the bonds had a series number and a number in the series, and that the plan of drawing on the back of the bonds shows that up to April, 1874, there were to take place five drawings a year on dates therein mentioned, and that these drawings should determine upon which of the so-called bonds payments should be made and the amounts of such payments.

The defendant admitted to me that until the end of the nine-
teenth year after the date of the issue of the so-called bonds
17 four drawings per year were to take place at stated dates for the purpose of determining upon which of the so-called bonds payments should be made and the amounts of such payments, and that thereafter and up to and including the thirty-first year three drawings were to take place at fixed dates for each year for the purpose of determining upon which of the so-called bonds payments should be made and the amounts of such payments, and thereafter and up to and including the fifty-fifth year after the date of the issue of such bonds two drawings per year were to take place for the purpose of determining upon which of the so-called bonds payments should be made and the amounts of such payments, and that according to said plan the smallest amount to be paid for any of such bonds selected for payment during the first year after issue was one

hundred and thirty-five gulden, and during the second year one hundred and forty gulden, and during the third year one hundred and forty-five gulden, and so on, increasing in amount five gulden each year until the amount should reach two hundred gulden, which amount of two hundred gulden then remained fixed as the minimum sum to be paid for any of the so-called bonds.

He admitted to me that under the plan other large amounts are provided to be paid on certain of the bonds to be determined by the drawings, and that during the first year the following sums according to such plan were to be paid on certain of the bonds to be determined by such drawing, to wit: On one bond, two hundred and fifty thousand gulden; on one bond, twenty-five thousand gulden; on one bond, fifteen thousand gulden; on one bond, ten thousand gulden; on two bonds, each five thousand gulden; on three bonds, each three thousand gulden; on six bonds, each one thousand gulden; on fifteen bonds, each five hundred gulden; on thirty bonds, each four hundred gulden.

He admitted to me that during subsequent periods other provision was made for larger amounts; that all of the so-called bonds were in the same form as the bonds marked Exhibit Number 2.

18 He admitted to me that all of the drawings referred to by which, first, are determined the series of the so-called bonds to be paid or redeemed in each year, and, second, the particular bonds in the series whose holders shall be entitled to the larger sums which I have stated, the numbers of which are drawn from a wheel, are conducted in such a way that the determination of the numbers, both for redemption and amount, is wholly by lot or chance, and that the holder of each bond has an equal chance with the holder of every other bond, first, in securing an early payment of his bond, and, second, in securing as payment for his bond the very large prize to which reference has been made, and that the result in each case is wholly dependent upon lot and chance.

He admitted to me that a gulden and a florin were the same value.

He admitted to me that all of the bonds to which that circular relates are to be repaid by the expiration of the fifty-fifth year after their issue.

It is admitted on the record by counsel for the prosecution and for the defendant that the bond in question in this case represents one hundred florins and is one of a series of bonds aggregating forty million gulden, state loan, and that the bonds, of which the one which has been offered in evidence is one, all represent loans made to the Empire of Austria and ~~raised~~ issued for the purpose of raising revenue for the government in order to defray governmental expenses and carry on general state affairs.

(The prosecution rests.)

Defendant's counsel moved the court to direct the jury to acquit on the following grounds:

(1.) That the defendant is not shown by the evidence to

19 have committed any offense against any statute law of the United States or against the common law.

(2.) That the circular with causing the mailing whereof the defendant is charged in this prosecution is not a matter prohibited under section 3894 of the Revised Statutes.

(3.) Said circular does not concern or relate to a lottery, so-called gift concert, or similar enterprise offering prizes depending upon lot or chance or concerning schemes devised for obtaining money or property under false pretenses nor does the same concern or relate to a lottery or similar scheme or a lottery ticket or part thereof.

(4.) That the bond or bonds mentioned in said circular which have been proved herein are not a *a* lottery, so-called gift concert, or similar enterprise offering prizes depending upon lot or chance or concerning schemes devised for the purpose of obtaining money or property under false pretenses, nor are the same a lottery or similar scheme or lottery ticket or part thereof.

(5.) That the bond or bonds mentioned in the indictment and proved upon the trial herein are government bonds issued by the Empire of Austria and not within the language, meaning, or purview of the statute for any violation of which the said Edward H. Horner, the defendant, has been charged herein.

The defendant's counsel moved that the prosecution against the defendant herein be dismissed upon the same grounds severally as above enumerated.

The court denied each of said motions, and defendant's counsel thereupon took and was duly allowed exception to such denial.

The jury thereupon rendered a verdict of guilty.

And forasmuch as none of the said matters and exceptions so offered and made to the rulings and directions of such judge do appear upon the record of said case, therefore, upon the prayer of said defendant, by his counsel, the said judge has signed and sealed this bill of exceptions *nunc pro tunc* as of the 24th day of May, one thousand eight hundred and ninety-two.

Dated July 8, 1892.

(S'g'd) CHAS. L. BENEDICT.

ALFRED TAYLOR,
HERMAN AARON,
Attorneys for Plaintiff in Error.

(Endorsed:) U. S. circuit court. United States *vs.* Edward H. Horner. Bill of exceptions. Alfred Taylor, Herman Aaron, attorneys for def't, 15 Wall street, New York city. Approved as to form. (S'g'd) Edw'd Mitchell, U. S. att'y. U. S. circuit court. Filed July 8, 1892. John A. Shields, clerk.

United States Circuit Court of Appeals for the Second Circuit.

EDWARD H. HORNER, Plaintiff in Error,
against
THE UNITED STATES OF AMERICA, Defendant in Error,

Afterwards, to wit, on the 8th day of July, 1892, at a stated term for 1892 of the United States circuit court of appeals for the

21 second circuit, at the city of New York, comes the said Edward H. Horner, by Alfred Taylor and Herman Aaron, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

I.

That the matters charged in the indictment and proved upon the trial do not constitute a crime by the common law or under any statute of the United States.

II.

That the circular with mailing or causing the mailing whereof the defendant is charged herein does not concern or relate to a lottery, so-called gift concert, or similar enterprise offering prizes depending upon lot or chance or concerning schemes devised for the purpose of obtaining money or property under false pretences, nor does the same relate to a lottery or similar scheme or a lottery ticket or part thereof.

III.

That the bond or bonds mentioned in said circular and proved upon the trial are government bonds issued by the Empire of Austria and not within the language, meaning, or purview of the statute with a violation of which the said Edward H. Horner has been charged herein.

IV.

That the court erred in not directing the jury to acquit the defendant upon the trial hereof.

22 V.

That said court erred in not dismissing the prosecution herein.

Wherefore said Edward H. Horner prays that the conviction of the circuit court of the United States for the southern district of New York be reversed and the prosecution herein be dismissed.

ALFRED TAYLOR,
HERMAN AARON,
Attorneys for Plaintiff in Error, 15 *Wall Street, New York City.*

(Endorsed:) U. S. circuit court. Edward H. Horner, plaintiff in error, *vs.* The United States of America, defendant in error. Assignment of errors. Taylor & Parker, attorneys for pl'ff in error, 15 Wall street, New York city. Due service of a copy hereof this 14th day of July is admitted. (S'g'd) Edw'd Mitchell, U. S. attorney. U. S. circuit court. July 14, 1892. John A. Shields, clerk.

23 The United States Circuit Court of Appeals for the Second Circuit.

EDWARD H. HORNER, Plaintiff in Error,
against
THE UNITED STATES, Defendant in Error. } Joinder in Error.

And afterwards, to wit, on the 29th day of July, 1892, the said defendant in error, by Edward Mitchell, its attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said circuit court of appeals, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

(S'g'd) EDW'D MITCHELL,
Attorney for Defendant in Error.

(Endorsed:) U. S. circuit court of appeals, second circuit. Edward H. Horner, pl'ff in error, *versus* United States, def't in error. Joinder in error. Edward Mitchell, United States attorney, attorney for defendant in error. Due service of a copy of the within is hereby admitted. New York, July 16, 1892. (S'g'd) Alfred Taylor, Herman Aaron, attorneys for plaintiff in error. U. S. circuit court. Filed July 16, 1892. John A. Shields, clerk.

24 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

UNITED STATES OF AMERICA
vs.
EDWARD H. HORNER. } Bond for Damages and Costs.

Know all men by these presents that we, Edward H. Horner and Alexander Frank, are held and firmly bound unto the above-named United States of America in the sum of two hundred and fifty dollars, to be paid to the United States of America; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 11th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas the above-named Edward H. Horner has prosecuted a writ of error to the United States circuit court of appeals for the second circuit to reverse the judgment of conviction rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Edward H. Horner shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his

writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ALEXANDER FRANK. [L. S.]
EDWARD H. HORNER. [L. S.]

Sealed and delivered and taken and acknowledged this 11th day of July, 1892, before me—

GERSON GOLDSTEIN,
Notary Public (115), *N. Y. Co.*

[SEAL.]

UNITED STATES OF AMERICA, *Southern District of New York*, } *ss:*

Alexander Frank, being duly sworn, deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

(S'g'd) ALEXANDER FRANK.

Sworn to this 11th day of July, A. D. 1892, before me—
GERSON GOLDSTEIN,
Notary Public (115), *N. Y. Co.*

(Endorsed:) U. S. circuit court, southern district of New York. United States *vs.* Edward H. Horner. Bond for damages and costs on writ of error. Alfred Taylor, Herman Aaron, att'ys for pl'ff in error. Approved July 14, 1892. (S'g'd) Chas. L. Benedict. Due service of a copy of within this 14th day of July admitted. (S'g'd) Edw'd Mitchell, U. S. att'y. U. S. circuit court. Filed July 14, 1892. John A. Shields, clerk.

26 UNITED STATES OF AMERICA, *ss:*

To the United States of America and Edward Mitchell, United States attorney for the southern district of New York, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the second circuit, at the city of New York, on the 29th day of July, 1892, pursuant to a writ of error taken and allowed and filed in the clerk's office of said last-named court, wherein Edward H. Horner is plaintiff in error and The United States of America is defendant in error, to show cause, if any there be, why the judgment of conviction in said writ of error mentioned shall not be corrected and speedy justice should be done to the parties in that behalf.

Dated New York, July 14, 1892.

CHAS. L. BENEDICT.

ALFRED TAYLOR,
HERMAN AARON,
Att'ys for Pl'ff in Error.

(Endorsed:) U. S. circuit court. Edward H. Horner, plaintiff in error, *vs.* The United States of America, defendant in error. Citation. Taylor & Parker, attorneys for pl'ff in error, 15 Wall street,

New York city. Due service of a copy hereof this 14th day of July admitted. Edw'd Mitchell, U. S. district attorney. U. S. circuit court. Filed Jul- 14, 1892. John A. Shields, clerk.

27 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES OF AMERICA, Def't in Error,
ads.
EDWARD H. HORNER, Plaintiff in Error.

The clerk will enter my appearance for the plaintiff in error.
ALFRED TAYLOR.
HERMAN AARON.

(Endorsed:) United States circuit court of appeals, second circuit. U. S. of America, def't in error, *ads.* Edward H. Horner, pl'ff in error. Alfred Taylor, Herman Aaron, counsel for pl'ff in error. United States circuit court of appeals, second circuit. Filed Jul- 29, 1892. John A. Shields, clerk.

28 At a term of the United States circuit court of appeals for the second circuit, held at the post-office building, in the city of New York, southern district of New York, on the 25th day of October, 1892.

Present: Hon. William J. Wallace, presiding justice.
" E. Henry Lacombe, justices.

EDWARD H. HORNER, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

The appeal herein being duly taken herein by a writ of error to this court:

Now, therefore, pursuant to section six of chapter five hundred and seventeen of the laws of eighteen hundred and ninety-one, this court does hereby certify to the Supreme Court of the United States the following questions or propositions of law concerning which it desires the instructions of that court for its proper decision, to wit:

(1.) Do the bonds mentioned and described in the first and second counts of the indictment herein represent a "lottery or similar scheme" within the meaning of section thirty-eight hundred and ninety-four of the Revised Statutes of the United States?

29 (2.) Is the circular described and set forth in the first and second counts of the indictment herein a "circular concerning any lottery, so-called gift concert, or other similaw enterprise offering prizes dependent upon lot or chance" within the meaning of section thirty-eight hundred and ninety-four of the Revised Statutes of the United States?

(3.) Does the circular mentioned and set forth in the first and second counts of the indictment herein constitute a "list of the draw-

ings at any lottery or similar scheme" within the meaning of section thirty-eight hundred and ninety-four of the Revised Statutes of the United States?

WM. J. WALLACE.
E. HENRY LACOMBE.

(Endorsed:) U. S. circuit court of appeals. Edward H. Horner, pl'ff in error, *vs.* United States of America, def't in error. Certificate to U. S. Supreme Court for instructions. Within approved of. Edw'd Mitchell, U. S. att'y. United States circuit court of appeals, second circuit. Filed Oct. 31, 1892. John A. Shields, clerk.

30 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss.:*

I, John A. Shields, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from one to twenty-nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Edward H. Horner, plaintiff in error, against The United States of America, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-fifth day of November, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the said United States the one hundred and seventeenth.

Seal United States Circuit Court of Appeals, Second Circuit.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 15,217. U. S. circuit court of appeals, second circuit. Term No., 1247. Edward H. Horner, plaintiff in error, *vs.* The United States. Filed December 1st, 1892.

JAN 6 1893
JAMES H. McKENNEY,
CLERK.

Case No. 15,217.

Supreme Court of the United States,

OCTOBER TERM, 1892.

Term No. 1,247.

EDWARD H. HORNER,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ALFRED TAYLOR,
FREDERICK S. PARKER,
HERMAN AARON,
Counsel for EDWARD H. HORNER,
Plaintiff in Error.

CASE NO. 15,217.

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM NO. 1247.

EDWARD H. HORNER,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This cause comes up upon a certificate or request for instructions issued to this Court by the United States Circuit Court of Appeals for the Second Circuit. The request was made pursuant to section six of the Appellate Court's Act (Chap. 517, Laws of 1891) and brings up for determination the question as to whether a certain class of government bonds such as are issued by the Empire of Austria and nearly all the other countries of continental

Europe upon loans made to them shall be denied transit through our mail service on the ground that they are or relate to "lotteries" within the meaning of § 3894 R. S., commonly known as the anti-lottery act. In other words shall they be stigmatized as lottery tickets?

Edward H. Horner, the plaintiff in error was indicted for an alleged violation of § 3894 R. S., as amended by the act of September 19, 1890. The offense alleged is a deposit in the mails of a circular relating to the redemption of Austrian government bonds. The circular and the bonds to which it relates are fully described in the indictment (Record, pp. 2–8) and in the testimony on the trial (Record, pp. 10–11).

It is claimed by the plaintiff in error that the Austrian government bonds in question or circulars relating to the same are not within the prohibition of the statute and that he committed no offence by the mailing of such circular.

The facts are all undisputed, so that the case presents solely a question of law.

It is admitted on the record by counsel for the prosecution and for the defendant, that the bond in question in this case represents one hundred florins and is one of a series of bonds aggregating forty million gulden State loan, and that the bonds of which the one which has been offered in evidence is one, all represent loans made to the Empire of Austria and issued for the purpose of raising revenue for the government in order to defray governmental expenses and carry on general State affairs. (Record, p. 11).

The bond in question reads as follows:

"Series 921. 100 Florins. Number 60.

"Premium Bonds.

"One hundred florins, Austrian standard as share

"of the loan of forty million florins, Austrian "standard, made according to the law of Novem- "ber 17, 1863. (Law Journal of the Empire No. "98) for which the amount resulting according to "the plan of redemption will be paid to the bearer "by the Universal State Loan Treasury, Vienna, "February 11, 1864.

"JOSEPH RUDDE,
"*Imperial Royal Minister, Counsellor.*

"(Coat of Arms).

PLENER,
Imperial Royal, Minister of Justice.

"For the Board for controlling the State Loans.

(Signed.) "COLLERODO MANNSFELDT.

(Signed.) "WINTERSTEIN.

"For the Imperial Royal Universal State Loan "Treasury.

(Signed.) "WINTER.

(Signed.) "SCHIMKOWSKY."

The plan of redemption shows (Record, p. 7), that certain drawings are to take place each year to determine which bonds shall be redeemed, and that the bonds called the first year shall be redeemed at 135; those called the second year at 140; those called the third year at 145 and so on increasing in amount five florins (or gulden) each year until in the nineteenth year the redemption shall be at 200, which shall thereafter remain the fixed sum for redemption. *The plan is so arranged that all the bonds must be redeemed within fifty-five years.*

In addition to above other large amounts are provided to be paid on certain of the so-called bonds to be determined by drawings.

The increase in the price of redemption together with the additional sums paid in the awards upon the redeemed bonds really represent interest in the loan. Instead of paying to each holder an equal amount of interest, the government makes an unequal distribution of the interest fund in the manner above outlined. The government distributes in this way, in payments upon the bonds a sum which in the aggregate is substantially the same as the interest at the usual rate would be upon the entire loan—*and also pays the principal of the loan.*

The plaintiff in error was brought to trial and convicted of a violation of § 3894 R. S. upon proof of the mailing of a circular relating to the bonds above mentioned. He moved for a direction to acquit and also for a dismissal on the grounds mentioned below in the assignment of errors and to the refusal of the Court duly excepted (Record, pp. 11–12). He assigned the following

ASSIGNMENT OF ERRORS.

I.

That the matters charged in the indictment and proved upon the trial do not constitute a crime by the common law or under any statute of the United States.

II.

That the circular with mailing or causing the mailing whereof the defendant (plaintiff in error)

is charged herein does not concern or relate to a lottery, so-called gift concert or similar enterprise offering prizes depending upon lot or chance or concerning schemes devised for the purpose of obtaining money or property under false pretences nor does the same relate to a lottery or similar scheme or a lottery ticket or part thereof.

III.

That the bond or bonds mentioned in said circular and proved upon the trial are government bonds issued by the Empire of Austria and not within the language, meaning or purview of the statute with a violation of which the said Edward H. Horner has been charged herein.

IV.

That the Court erred in not directing the jury to acquit the defendant.

V.

That the Court erred in not dismissing the prosecution.

A writ of error was duly taken to the United States Circuit Court of Appeals. Upon such appeal that Court issued to this Court its certificate of the following questions or propositions of law, concerning which it desires the instructions of this Court for its proper decision, to wit:

1.

Do the bonds mentioned and described in the first and second counts of the indictment herein represent a "lottery or similar scheme" within the meaning of § 3894 of the Rev. Stat. of the U. S.?

2.

Is the circular described and set forth in the first and second counts of the indictment herein, a "circular concerning any lottery, so-called gift, concert or similar enterprise, offering prizes dependent upon lot or chance," within the meaning of § 3894 Rev. Stat. of the U. S.?

3.

Does the circular mentioned and set forth in the first and second counts of the indictment herein, constitute a "list of the drawings at any lottery or similar scheme" within the meaning of § 3894 of the Rev. Stat. of the U. S.?

POINTS.

First Point.

IT IS NOT A PROPER TEST TO APPLY TO THE GOVERNMENT BONDS IN QUESTION, WHETHER OR NOT THEY HAVE AN ELEMENT OF CHANCE IN THEM; BUT THE TEST SHOULD BE, ARE THEY A "LOTTERY OR SIMILAR SCHEME"?

Section 3894 of the Revised Statutes as amended, under which appellant was apprehended, reads so far as is material, as follows:

"No letter, postal card, or circular concerning any "lottery, so-called gift concert, or other similar en- "terprise offering prizes dependent upon lot or "chance, or concerning schemes devised for the "purpose of obtaining money or property under "false pretenses, and no list of the drawings at "any lottery or similar scheme, and no lottery "ticket or part thereof, and no check, draft, bill, "money, postal note, or money order for the pur- "chase of any ticket, tickets or part thereof, or of "any share or of any chance in any such lottery or "gift enterprise, shall be carried in the mail, or de- "livered at or through any post office or branch "thereof, or by any letter carrier:

"Nor shall any newspaper, circular, pamphlet, "or publication of any kind, containing any adver- "tisement of any lottery or gift enterprise of any "kind offering prizes dependent upon lot or chance, "or containing any list of prizes awarded at the "drawings of any such lottery or gift enterprise, "whether said list is of any part, or of all, of the

"drawing, be carried in the mail, or delivered by "any postmaster or letter carrier."

The only language of the act which it can be claimed extends to the bonds in question is, "No circular concerning any lottery, so-called gift concert or similar enterprise, offering prizes dependent upon lot or chance." * * * * * "No list of drawings at any lottery or similar "'scheme,'" "No lottery ticket or part thereof," and "No circular containing any list of prizes "awarded at the drawings of any such lottery or "gift enterprise."

The bonds in question are clearly "No gift con- "certs or similar enterprises."

The only question, therefore, involved in this case is, whether the government bonds which are above described are "A lottery or similar scheme"?

It will be readily conceded that a lottery is one form or species of gaming.

Bishop on Statutory Crimes, Section 953;
Thomas *vs.* People, 59 Ill., 160;
Bell *vs.* The State, 5 Sneed, 509.

"A lottery is a 'game of hazard,' in which small sums are ventured for the chance of obtaining greater."

Worcester's Dict.

It is well to bear in mind at the outset that not all gaming is within the purview of the act in question.

The only form of gaming concerning which matter is barred from the mail are *lotteries, gift concerts* or similar enterprises.

There are many other forms of gaming than these two which are enumerated; such as faro, shuffle-

board, pico, keno, baccarat, French pool, draw poker, bagatelle, and numerous others, quite a number of which will be found enumerated in 5 Criminal Law Magazine, 533.

It is perfectly apparent that letters, circulars, etc., relating to other forms or species of gaming than the two enumerated in the statute in question, may be mailed without violating the statute.

Thus it would be lawful to mail a letter or circular "concerning" faro or French pool, baccarat, or keno, or other games of chance than those specifically named in the statute.

This is obvious, from the language of the statute without requiring the citation of any rule of interpretation.

Should there be the slightest question upon this point, however, the familiar rule that penal statutes will be strictly construed, and the maxim, *inclusio unius est exclusio alterius*, will dispose of any doubt.

It is important to bear in mind the above limitations of the statute in order to avoid a tendency of including, within the prohibition of the statute, everything which may have the *element of chance connected with it*, and of making the element of chance *the test* by which the statute is to be interpreted.

The element of chance is not the test, for, as we have shown above, even *games of chance*, whose sole purpose is gambling, are not reached by the statute, but matter pertaining to the same may be lawfully mailed.

In many of the States in which lotteries are prohibited the Legislatures recognize the fact that there are other species of gaming which they desire to suppress, and accordingly provide for some of such other species in language which is very extensive in itsscope.

Thus, the Maryland Statute prohibits the sale of "lottery tickets" and "what are called policies, "certificates, or anything by which the vendor or "other person promises or guarantees that any "particular number, character, ticket or certificate "shall, in any event, or on the happening of any "contingency, entitle the purchaser or holder to "receive money, property, or evidence of debt." And also of "All devices and contrivances designed "to evade the provisions of the preceding section."

Maryland Stat., Art. 27, Secs. 172, 178 and 173.

A further examination of Article 27 of the Maryland Statutes will show how the statute aims to cover all games of chance.

Such, however, is not what Congress did in passing the statute in question; and instead, therefore, of proceeding as a court would be disposed to do, under an extended and wide-sweeping statute, such as that of Maryland, by applying the element of chance as a test, the test here must be not whether the bonds in question have an element of chance, but whether they are a *lottery or similar scheme.*

Second Point.

THE GOVERNMENT BONDS IN QUESTION ARE NOT "A LOTTERY OR SIMILAR SCHEME."

It is *admitted* (Record, p. 11), and it also appears upon the face of the bonds in question (Record, p. 6) that they were issued by the Empire of Austria for

a loan of forty million Florins, according to a law of November 19, 1863; and that the loan was made for the purpose of raising revenues for the government in order to defray governmental expenses, and carry on general state affairs (Record, p. 11).

The bond in question represents one hundred Florins of such loan. And the government promises to pay the same to bearer according to the plan of redemption upon said bond.

As is shown by the indictment and testimony, all of the bonds are bonds to be redeemed within fifty-five years from the date of their issue (Record, pp. 7 and 11).

During the first year the government agrees to pay as the minimum amount for any bond redeemed, one hundred and thirty-five Gulden, or Florins, during the second year, one hundred and forty Gulden or Florins, during the third year, one hundred and forty-five Gulden or Florins; and so on increasing in amount five Gulden or Florins each year, until the minimum amount to be paid by the government on each bond redeemed is two hundred Gulden or Florins (Record, pp. 7, 10 and 11).

Besides these fixed amounts, the government also agrees to distribute certain larger premiums or awards.

The primal only object is to raise money to carry on the government.

We assume that it will be admitted that this loan is not a lottery in the sense in which such an enterprise is usually carried on or popularly understood. It is not a lottery such as the Louisiana Lottery against which the statute in question was aimed.

House Rep. No. 2844, 1st Sess. 51st Cong., Sen. No. 1579, *ibid.*

It is not a state or government lottery, such as the state and government lotteries of history.

There is no rule of interpretation so obviously founded in reason and justice as that which requires a penal statute to be interpreted according to its popular meaning.

An infraction of such a statute is visited with fine and imprisonment upon the common people; and it would be a palpable oppression for the Courts to give refined meanings to statutes, different from those which they would convey to the common people, and thus punish and degrade a citizen for the violation of a law which did not, in the popular meaning of its language, make the act complained of a crime.

In U. S. *vs.* Comerford, 25 Fed. Rep., p. 904, the Court says:

"We have been taught to believe that it was the "greatest injustice towards the common people of "old Rome when the laws they were commanded "to obey, under Caligula, were written in small "characters, and hung upon high pillars, thus "more effectually to ensnare the people. How "much advantage may be justly claim over the "old Roman, if our criminal laws are so obscurely "written that one cannot tell when he is violating "them? If the rule contended for here is to be ap-"plied to the defendant, he will be put upon trial "for an act which he could not by perusing the "law have ascertained was an offense. My own "sense of justice revolts at the idea. It is not in "keeping with the genius of our institutions, and I "cannot give it my sanction."

Apply that principle to the case of the bonds in question, and all basis for the prosecution in this case, will vanish.

Let us suppose that the Austrian Government

should desire to set up a State lottery, as it and many other governments, including our own, have done. It would sell regular lottery shares; have an early drawing of prizes, and distribute money which it realized from the sale of the shares, less a profit to itself, to the lucky winner.

How essentially different is such scheme from the government loan for which the bonds in question were issued.

The meaning of a lottery is as well known to the common people as to the Courts.

Nearly all governments have had at one time or another state lotteries, and the patrons of these lotteries were the common people; and the signification of the term lottery is fully known to them.

Ask a subject of Austria, who invests his savings by loaning them to his government upon its bond whether that bond is a lottery ticket, and he will unhesitatingly answer, No. Ask a citizen of this country whether the bond of the Empire of Austria, issued upon a loan of money to it for government expenditures, is a lottery ticket, and he will promptly answer, No.

It is not like the Louisiana lottery; *it is not like a state lottery which a government sets up when it desires to set up a lottery.*

In order to hold the government loan in question to be a lottery, the Court must of course, find that it is in fact, and in its gist and essence, a lottery; to wit, a lottery as a business. Such is the meaning that universally attaches to lotteries, to wit, that they are founded, having as their essential feature the business of selling shares, and of distributing *from the proceeds* prizes among winners.

The money received from the sale of shares is used to maintain the lottery as a business; and it is *the* fund out of which the prizes are paid.

In the case of the bonds in question, it is con-

ceded (Record, p. 11) that the money received by the government upon the loan in question was paid out for defraying governmental expenses. It is not in the slightest degree used as a fund out of which to pay prizes or to repay the loan ; but the money for such purpose is raised by taxation, and the usual means of raising revenue :

Has there ever been known a lottery which did not depend for its maintenance upon the moneys collected from shares ? Such is the essential business feature of a lottery.

In the case of the government loan in question this feature is entirely absent ; the money raised as a loan was actually paid out for governmental expenses, as money raised on governmental loans invariably is, and shows the transaction to be *essentially and primarily* a loan, and not a lottery.

We can conceive of ingenious devices adopted by lottery promoters for the purpose of cloaking a lottery enterprise in a false garb, so as to evade laws directed against them.

But it would be idle we submit to impute to a sovereign power like the Empire of Austria the intention of adopting a subterfuge for the purpose of evading its own law, when, by the exercise of its sovereign will at any moment, it can change the law.

It would also be idle to impute to the Austrian Government (one of the great powers with which our Government is on friendly intercourse) the opprobrious charge of adopting an artful device to evade the statutes of the United States against lotteries.

There is not the slightest evidence of such design ; and in the nature of things there cannot be ; and comity, we may assume, would forbid us from indulging in any such discourtesy. But we are not left in the slightest doubt on the subject ; for, as ap-

pears by the bonds, they were issued and the loan to the Austrian Government was made in 1864.

This was many years prior to the amendment of Section 3894, and many years prior to the enactment of the original section which was passed in 1872.

It must, therefore, be held that the loan to the Austrian Government was what it purported to be, a legitimate, *bona fide* loan.

As we have above seen a lottery is but a species of gaming.

If we are therefore called upon to brand the loan in question as a lottery, the Court will have to stigmatize a government loan of a great European power as a game.

We apprehend that the Court will hesitate before laying the very highest and vital exercise of governmental power, upon which depends the very existence of government and the maintenance of law, under the ban of being held a game.

The same reasons will impel such hesitancy as prevailed with the Court in Woodcock *vs.* McQueen, (11 Ind., 14), in refusing to characterize a State election as a game.

In that case, the Statute provided for the punishment of persons betting upon the result of any game; and the case before the Court was that of a person betting on an election. The Court said: "In other words, is an election in a popular gov- "ernment, held pursuant to the constitution and "laws of such government, *a game, in the legal* "*sense of that term?* We had not supposed that "such was the theory of our elections. A game "we had looked upon as a thing of chance, skill or "trick—involving no principle, no truth—as vic- "ious in itself, or tending to vice—a thing played "by gamesters, with their own limbs, or with im- "plements, or instruments, having no wills of their

"own, but simply doing that of the respective "players; while an election, we had regarded as "being a thing done pursuant to law, in which all "the actors were agents, possessing free wills of "their own, judgments, and motives which de- "termine their course of action, guided by fixed "principles and views pertaining to the general "welfare which they desired to promote. And it "still seems to us that to regard candidates and "politicians in our elections as players of games "of chance, and the people as implements with "which they play them, would be derogatory and "degrading to the character of our government, "and of pernicious influence, as tending to destroy "that high tone of moral and political principle "and patriotism, and sense of dignity which should "ever be fostered and upheld among the people."

If we have succeeded, as we believe we have, in showing that the main and primary object and feature of the government loan in question, is that of a loan and not a lottery, there remains then the further question, whether because it has attached to it as a subsidiary feature an element which is like that of a lottery, it becomes transformed into a lottery?

As a matter of reasoning, we cannot conceive how, if in a large and main body there exists a small and subsidiary element of a different characteristic from the main body, the whole body will, therefore, be deemed transformed into such small and subsidiary element.

It would be like saying that the Government of the United States, because the Federal Judges are appointed by the President and not elected by the people, is not a government of popular elections.

An exactly parallel case to the one at bar would be that arising under a statute which prohibits con-

certs on Sundays; and it should be urged that the law applied to church services.

The essential feature of a concert is singing before an assembly. A church service has in it one feature which is exactly like the characteristic one in the concert, to wit, singing before an assembly of people.

Yet it would be manifestly absurd to say that, because the church service happened to have a feature which was the same as a concert, therefore, it should be characterized as a concert.

So in the case at bar, it cannot be maintained, we submit, that, because a *bona fide* government loan happens to have as one of its features something which is akin to the characteristic feature of a lottery, therefore it becomes a lottery.

The immediate repelling of the claim to bring a church service under the head of a concert, cannot be claimed to be due to any superior feeling of the sacredness of the church service to that which would be felt when it is sought to bring a government loan under the ban: for, in the eye of the Municipal law, there can be no higher or more sacred object than the raising of a government loan, for upon it all government and all law depend.

Let it be supposed that a person in good faith should honestly borrow a large sum of money from another with which to carry on a lawful business, not a lottery business, and should make an agreement for repaying the same, and also agree that under certain contingencies, dependent upon chance he would pay some additional premium; and that the transaction was not a cloak for carrying on a lottery scheme.

It certainly would not be held that that he was engaged in a lottery scheme.

This is precisely such a transaction. The govern-

ment borrows in good faith, as is undisputed, a large sum of money to carry on a lawful business, to wit, the affairs of the government. The whole loan represents forty millions of florins. Each particular bond represents a part of such grand loan; and the humble loaner of one hundred florins, it is submitted, stands in the eye of the law, as favorably as if he loaned the government the entire forty millions of florins.

It may be said that some lottery company might, if these bonds are upheld, carry on its business in the form of a small loan, which it would at all events return, and also offer larger prizes.

The answer is, that in whatever guise they would carry on their business, it would be palpable that it was a subterfuge, and that the object of the alleged loan was not to carry on a legitimate business, but only a lottery.

Any attempted evasion of the law by a lottery company upon the plan of the bonds in question could be easily detected. Besides, it would be utterly impracticable; for what lottery Company could borrow money or sell tickets in which a right of repayment or a prize might not be determined for fifty-five years? A lottery speculator wishes to invest a small sum for a chance of immediately winning a large sum; and he is quite the opposite of a person to tie up his money for possibly two generations.

The whole spirit of the loan in question is that of a prudential ultra conservative investment, in marked contrast to the reckless gambling "win or lose" spirit of a lottery speculation.

Similar bonds to the ones in question came up for consideration by the Court of Appeals of the State of New York, in Kohn *vs.* Koehler, 96 N. Y., 362.

The statutes of that State were the same in scope as the Federal statute we are now con-

sidering, and yet the Court held that the bonds did not come within the purview of the statute, and held that neither they nor the loans they represented were lotteries.

The New York statute existing at the time, Sections 26 and 32 of Article 4 of Title 8 of Part I, Chap. 20 of the Revised Statutes, provided as follows :

Section 26. "Every lottery game or device of "chance in the nature of a lottery, by whatever "name it may be called, other than such as have "been authorized by law, shall be deemed unlaw-"ful, and a common and public nuisance."

Section 32. "Any person who shall purchase any "share, interest, ticket, certificate of any share or "interest, or part of a ticket, or any paper or in-"strument purporting to be a ticket, or share or "interest in any ticket, or purporting to be a cer-"tificate of any share or interest in any ticket, or "in any portion of any illegal lottery, may sue "for and recover double the sum of money and "double the value of any goods or things in action "which he may have paid and delivered for such "purpose, with double costs of suit."

In addition to these statutes, the Constitution of the State of New York (Article I, Section 10), adopted 1846, provided : "Nor shall any lottery "hereafter be authorized, or any sale of lottery "tickets allowed within this State."

The plaintiff purchased from the defendant one of the bonds in question, and thereupon, under the statute, sued to recover the double penalty.

The Court said, after fully describing the bonds :

"The bond in question provides for the payment "of the sum of one hundred gulden by the Austrian "Government, in accordance with the conditions en-"dorsed on the back of the same, together with one-

"fifth part of any such sum as may be allotted to "the prize number of the bond, which sum must "amount to at least one hundred and twenty "gulden, with interest as provided.

"Under the rules and regulations endorsed on "the bond, relating to the drawing and redemption "of the bonds, of which the one in question con- "stituted a part, provision is made for the draw- "ing of the bonds by a division into series, and the "drawing of a certain number of series tickets to "be deposited in a wheel to await the drawing of "the prize numbers. At a time named, a drawing "is to be had from the series numbers, and pro- "vision is also made for the drawing of the prize "numbers deposited in another and separate wheel, "and the last named drawing designates the num- "bers which are entitled to prizes, which prizes "vary from six hundred gulden to three hundred "thousand gulden. Under the terms of the loan "for which the bonds were issued, the holder is "entitled to receive his principal and interest and "a premium of twenty per cent., and what is "termed a prize, if, by the drawing provided for, "he becomes entitled to the same. *The bonds re-* "*ferred to were issued by the Austrian Govern-* "*ment for the purpose of obtaining a loan of money,* "and the holders or owners receive the same upon "payment of the amount of principal therein "named, or of the market value thereof. *The evi-* "*dent object and purpose of the Government in is-* "*suing the bonds was to obtain money for its own* "*use and benefit.* According to the true inter- "pretation of the instrument, the Government, "upon receiving the money, promises to pay the "principal, interest and premium named, and in "addition, any sum which may be drawn by the "holder of the bond, in accordance with the rules "and regulations endorsed upon the same. This

"additional sum depends upon a contingency "which is to be decided by lot or chance. Inde- "pendent of this, the amount and terms are fixed "by the conditions of the bond. **The sub- "stance of the transaction relates to "a loan of money to the Government, "and the provision made for its pay- "ment. This is the main object and "purpose for which authority was "given to issue the bonds, and they "were disposed of, evidently, having "this in view. The provision by "which, upon a certain contingency, "the holder of the bond might receive "an additional sum, was no doubt an "inducement held out for the purpose "of obtaining money on the same, "but it did not constitute the main "feature, and the substance of the "transaction between the Govern- "ment and the purchaser of the bond. "It was a mere appendage and an "incident to its main purpose,** by means "of which the holder might by chance receive a "larger sum than the principal, and interest which "the bond itself provided for. In loaning money "upon these bonds, if the principal and interest "were paid the holder thereof ran no risk of loss, "and he took the chance which might arise in case "it should be determined by lot that his bond was "entitled to a larger sum than the principal, inter- "est and premium, which he was sure to get in any "event. **While this latter privilege de- "pended on chance, it cannot, we "think, be held upon any sound "theory, that it converted the bonds "into lottery tickets, and imparted to "the loan which was made thereon**

"**the character, object and accom-**
"**paniments of a mere lottery scheme.**
"The purchase and sale of bonds, stocks and other se-
"curities are often matters of chance as to the value
"of the securities. Prices in these fluctuate; some-
"times they may be bought at par, and sometimes
"they command a premium. A purchaser at par
"takes the chances of a rise in the value, or of a
"reduced valuation, if he purchases at any price.
"Here the purchaser ran the risk of deteriora-
"tion beyond the price named, and took the
"chance of a rise, if by lot the bond which he held
"became entitled to it. In both cases the value is
"a matter of chance, *and in neither can it*
"*be said, because it depends upon chance, that*
"*this chance constitutes a lottery.* The same re-
"marks will apply to other securities, which have
"a valuation which depends upon constant changes
"in the market. In many instances the value of
"securities of corporations may depend upon some
"chance which is annexed to to the terms provided
"for the issue of the same. A proposition is made
"for the sale of bonds by some corporate body,
"and subscriptions made therefor. The series of
"bonds and the times when payable are to be de-
"termined by chance, and their value may depend
"upon the time they have to run. It cannot well
"be said that a subscriber who takes the chance of
"drawing by lot a bond for a long term, which
"commands a higher price than one for a shorter
"period, purchases a lottery ticket, and that the
"corporation that issued it is engaged in a lottery
"enterprise. This rule might well apply to the
"drawing of a series of bonds from a wheel, and
"to the drawing of an additional amount by lot by
"any of the holders of that series. *It cannot, we*
"*think, be said that a loan made with a view to*
"*obtaining money to carry on the Government of*

"*a nation, and which contains a provision by*
"*which the amount can be increased as to a por-*
"*tion of it upon a contingency named therein,*
"*constitutes a lottery scheme, and is in violation*
"*of the constitution and laws of this State pro-*
"*hibiting lotteries, and of the tatute cited.*"

"In Hull *vs.* Ruggles (56 N. Y., 427), a lottery
"is defined as follows:

"Where a pecuniary consideration is paid, and
"it is determined by lot or chance, according to
"some scheme held out to the public, what and
"how much he who pays the money is to have for
"it, that is a lottery." A similar definition is given of a lottery in Section 323 of the Penal Code.

"Lotteries which are the subject of condemna-
"tion under the constitution and laws of this State
"are schemes where money is paid for the chance
"of receiving money in return. As a general rule
"the money thus paid, in case a prize is not drawn,
"is lost, and no return had for the same. The pur-
"chaser may draw a prize, or may draw a blank,
"and he thus hazards what he has paid upon the
"chances incident to a drawing by lot. The evils
"attending a system of lotteries, and against which
"the laws of this State are aimed, consist in the
"risk which people are willing to take in hazard-
"ing their money, with a chance of losing the same
"without any benefit or advantage whatsoever,
"and with but a remote prospect of gain. This
"was a species of gambling, which inflicted
"serious injury upon certain classes of the com-
"munity, which prompted the prohibition of lot-
"teries in the constitution of this State, and the
"enactment of severe laws against their operation.
"A Government bond, of the character of the one
"which is involved in this action, does not come
"within the mischief intended to be remedied, or

" within the scope and purpose of the enactments " against lotteries. Such an instrument is not " named, nor is it within the purview of the statute " or the intention of the lawmakers. *These bonds* " *have been issued by several of the governments* " *of other countries, and in no sense can they be* " *regarded as being within the inhibition of the* " *statutes of this State, which were intended to* " *suppress lotteries, and to prevent citizens from* " *indulging in this species of gambling.* The bond " in question was an evidence of debt, and a public " security of a foreign government, exposed for " sale, the same as other securities upon which " money is loaned, and its sale did not violate " the provisions of the statute already cited. It " was not raffled for, or distributed by lot or chance, " and it cannot be said that the purchase of the " same by the plaintiff was within the provisions " of Section 32 of 1 R. S., 665. Nor was the issue " of the bond or its sale a gift enterprise within " the provisions of the Penal Code already cited."

The same question also arose in the Supreme Court of California, under a similar bond in the case of *ex parte* **Shorbet, 70 California, 632, under a statute more stringent than the Federal Statute which is in question in this case; and the Court approved the ruling in Kohn** *vs.* **Kohler** (*supra*) **and decided accordingly.**

In March, 1878, one Oscar Bauman, was arrested in New York for sending circulars relating to Austrian bonds, through the mails. The statute, so far as the question here at issue is concerned, was in effect the same. The answer was brought before

United States Commissioner Osborne, who discharged the prisoner, and announced the following opinion:

"As the case presents itself upon this evidence, "the documents purporting to have been issued "under a lottery plan, or under circulars describ-"ing a lottery plan, have been proven by com-"petent witnesses to be genuine bonds, or docu-"ments issued as securities of the Austrian Gov-"ernment, or rather, one of the cities of the Aus-"trian Government—the City of Vienna. The "proof shows that these bonds, issued by the City "of Vienna, are guaranteed by the Austrian Gov-"ernment. It also appears that the purchase price "of one of the bonds produced here was about "eighty dollars—that they have a market value in "the European markets—that they are dealt in "here by the defendant, or by the firm with which "he is connected, they having purchased them to "sell again at, it appears, some advance on the "price he pays. But the point to be determined "here is, does the purchaser run any risk of los-"ing the money that he pays for the bond, provided "he pays no more for it than its face value? The "evidence is clear that he pays no more for it than "its face value, and that at the time of its redemp-"tion, he gets the face value of his bond returned "to him, with interest.

"It further appears that there is a chance that, "under a scheme provided by the government—"a system of drawings controlled by the finance "minister of Austria—the number of his bond may "draw a prize. But the element of fraud is en-"tirely out of the case, because the purchaser gets "a *quid pro quo* for his investment, whether he "gets a prize or not. There is no chance about it. "The only chance he has of losing his money is "that if he pays more for his bond than the face

" value, he may not be able to get his money, pro-
" vided the bond gets into market.

" The complaint is dismissed and the prisoner
" discharged."

On July 10th, 1884, Judge Benedict, presiding in the Circuit Court of the United States for the Southern District of New York, on motion of the United States District Attorney, ordered a *nolle prosequi* to be entered upon indictments found against employees of the International Banking Company for sending circulars similar to this one through the mails. The learned judge said he had read the opinion of Judge Miller, and fully concurred with him in his decision that the government bonds sold by the International Banking Company are not lottery tickets, but valid government bonds. This had been decided by United States Commissioner Osborne, as far back as March 8, 1878, in the case of the United States against Oscar Bauman, who was then in the employ of the International Banking Company.

These are the only decisions in the question involved with which we are familiar, except two cases in which an opposite conclusion was reached; one of them, the case of Ballock against the State of Maryland, 73 Md., 1.

For the reasons heretofore presented, that case, however, cannot, we submit, be followed in the case at bar.

Besides, it will be seen upon inspection that the decision was evidently influenced by the very wide sweeping provisions of the Maryland statutes, seeming to the Court to make the element of chance the test, which left it in the power of the Court to declare almost any transaction prohibited, because it had an element of chance in it.

The other case is United States against Zeisler,

30 Federal Reporter, 499, decided in the Circuit Court of Illinois.

For the reasons above given and upon the authorities cited, it is submitted, that the decision in that case was erroneous.

If there be any doubt as to the applicability of the statute, it must be resolved against the prosecution, for it is well settled that a penal statute must be strictly construed, and that any doubt arising under it must be resolved in favor of the accused.

Sutherland on Statutory Construction, Section 208, and cases cited.

"When a law imposes a punishment which acts "upon an offender alone and not as a reparation to "the party injured, and where it is entirely within "the discretion of the law giver, it will not be pre- "sumed that he intended it should extend further "than is expressed; *and humanity would require* "*that it should be so limited in construction.*"

Sutherland on Statutory Construction, Section 208.

State against Stephenson, 2 Baily, 334.

In U. S. *vs.* Comerford, 25 Fed. Rep., 904, the Court says:

"It may be well to consider the established rules "for interpreting criminal statutes.

"In the case of U. S. *vs.* Clayton, 2 Dill., 228, "the rule is well stated, and authorities cited in "the case are contained in 12 Myer's Fed. Dec., 86, "Sec. 345. Section 346 reads as follows:

"The principle that the legislative intent is to be "found, if possible, in the enactment itself, and "that the statutes are not to be extended by con- "struction to cases not fairly and clearly embraced "in their terms, is one of great importance to the "citizen. The Courts have no power to create "offences, but if, by a latitudinarian construction, "they construe cases not provided for to be within "the legislative enactments, it is manifest that the "safety and liberty of the citizen are put in peril, "and that the legislative domain has been invaded. "Of course, the enactment is not to be frittered "away by false construction, by metaphysical "niceties, or mere verbal and sharp criticism; "nevertheless, the doctrine is fundamental in "English and American law that there can be no "constructive offenses; *that before a man can be "punished, his case must be plainly and unmis- "takably within the statute; and if there be any "fair doubt whether the statute embraces it, that "doubt is to be resolved in favor of the accused.* "These principles admit of no dispute, and have "often been declared by the highest courts, and by "no tribunal more clearly than the Supreme Court "of the United States."

Cases cited: U. S. *vs.* Morris, 14 Pet., 464; U. S. *vs.* Wiltberger, 5 Wheat., 76; Ferrett *vs.* Atwill, 1 Blatchf., 151–156; Myers *vs.* Foster, 6 Cow., 567; Daggett *vs.* State, 4 Conn., 61.

Third Point.

THE QUESTIONS CERTIFIED SHOULD ALL BE ANSWERED IN THE NEGATIVE, AND THE JUDGMENT OF CONVICTION REVERSED, WITH COSTS.

Respectfully submitted,

ALFRED TAYLOR,
FREDERICK S. PARKER,
HERMAN AARON,
Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

EDWARD H. HORNER, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
} No. 1247.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

This case comes here, on certificate, from the circuit court of appeals for the Second circuit, and is an indictment found against the plaintiff in error, Horner, by a grand jury in attendance upon the circuit court of the United States for the southern district of New York.

The indictment is founded on section 3894, Revised Statutes of the United States, as amended by the *act of September* 19, 1890 (26 Stat. L., 465), which section, as amended, is as follows:

> No letter, postal card, or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lot-

tery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note, or money order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post-office or branch thereof, or by any letter-carrier; nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment, for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.

The indictment contains two counts.

FIRST COUNT.

The first count (pp. 2–5) charges that the accused caused to be deposited in the mail, for transportation, a certain circular concerning a lottery, a part of which is set out word for word (p. 3), and will be better understood after stating the substance of so much of the count, as follows:

In 1864 the Austrian Government, desiring to borrow 40,000,000 florins, issued a large number of "*premium bonds*" for 100 florins each, one of which is set out in this count (pp. 3, 4). As this so-called bond runs, the amount is denominated "a share of the loan," but the promise, instead of being in the usual form to pay the

bearer 100 florins, is to pay the amount resulting "*according to the plan* of redemption," which amount, according to that plan, *must be more than the 100 florins* stated in the bond.

As developed in this count, the plan of redemption is as follows:

Each bond belongs to a distinct series and each series is indicated by a number on each bond belonging to it, and, in addition, the bonds of each series are numbered consecutively. For example, the bond set out in this count belongs to series 921, and is number 60 of that series.

In order to determine what bonds were to be paid (for, it will be noted, the bonds do not purport to be payable on a certain day), and what amounts were to be paid on them respectively, it is stated on the back of each bond that up to April, 1874, five drawings a year, on certain days, were to take place, and after that date and until the end of the nineteenth year after the date of the issuing of the so-called bonds, that only four drawings a year were to take place, at fixed dates, and that afterwards and until the end of the thirty-first year three drawings a year were to take place on certain days, and that thereafter, until the end of the fifty-ninth year after the date of issue, two drawings a year were to take place, and by the end of this time all of the said bonds were to be repaid.

The smallest amount that could be paid on any bonds selected for payment during the first year after issue was 135 gulden or florins; during the second year, 140 gulden or florins; during the third year, 145 gulden or florins,

and so increasing 5 gulden each year until the amount should reach 200 gulden, which amount was then to remain fixed as the minimum sum to be paid on any bond.

But the scheme also provides that certain bonds, to be determined by the drawings, should receive, at different periods during its life, large sums of money; for example, that, during the first year, there should be paid on the lucky bonds, as follows:

	Gulden.
On one bond	250,000
On one bond	25,000
On one bond	15,000
On one bond	10,000
On 2 bonds, each at 5,000 gulden	10,000
On 3 bonds, each at 2,000 gulden	6,000
On 6 bonds, each at 1,000 gulden	6,000
On 15 bonds, each at 500 gulden	7,500
On 30 bonds, each at 400 gulden	12,000

The indictment then goes on to state that the objects of the drawings from the wheel are to determine (1) what particular series of bonds is to be advanced for payment, and next (2) what particular bonds of that series shall be paid in the larger sums. Thus each bondholder has an equal chance with every other one to secure an early payment of his bond, and, at the same time, to secure payment in one of the large prizes, the whole plan being thus dependent on lot or chance.

Thus introduced, the meaning and the connection with the aforegoing plan of that part of the circular set out in the indictment are apparent. The part thus set out, which made it an offense, as is alleged, to deposit in the mails the circular containing it, is as follows:

BANKING HOUSE OF E. H. HORNER, No. 88 WALL STREET,

New York, December 27, 1890.

110th redemption, December 1st, 1890, at Wein. The following 26 series were called in:

Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.
121	36	20,000	1369	24	24,400	2666	63	400
271	75	400		46	400		84	400
280	22	1,000	1792	19	400	2988	2	400
	65	400	1970	16	2,000		10	400
461	37	400		69	400		48	50,000
481	54	400		70	5,000		88	400
	72	10,000	3288	28	400	3195	44	5,000
487	69	400	2412	53	400		50	400
493	6	400		74	400	3238	14	5,400
684	14	400		82	400		52	400
	56	400	2483	36	400	3486	35	400
	94	400	2526	72	400	3685	39	400
815	70	400		82	400		81	400
	82	400	2531	44	400	3969	4	400
853	23	400		91	1,000		14	400
	61	400	2666	3	400		50	400
	81	400		18	2,000			400

All other bonds contained in the above twenty-six series not specially mentioned therein are redeemed with fl. 200.

Payment on and after March 1, 1891.

The next report of redemption will be published in the second half of the month of January, 1891.

SECOND COUNT.

This count is the same as the first except that it charges that the defendant deposited the said circular to be carried in the mail.

The defendant pleaded not guilty (p. 8.).

TRIAL AND VERDICT.

On May 24, 1892, the defendant was tried and convicted on both counts (p. 9).

JUDGMENT.

Thereupon the Court sentenced the defendant to pay a fine of $100 (p. 9).

WRIT OF ERROR TO THE CIRCUIT COURT OF APPEALS.

The defendant having excepted to several rulings of the court, a writ of error, to have the same reviewed, was sued out by him from the circuit court of appeals for the second circuit, at the city of New York.

QUESTIONS CERTIFIED.

The circuit court of appeals has certified to this court the following questions or propositions of law concerning which it desires the instructions of this court for its proper decision, to wit:

(1) Do the bonds mentioned and described in the first and second counts of the indictment herein represent a "lottery or similar scheme" within the meaning of section thirty-eight hundred and ninty-four of the Revised Statutes of the United States?

(2) Is the circular described and set forth in the first and second counts of the indictment herein a "circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance" within the meaning of section thirty-eight hundred and ninty-four of the Revised Statutes of the United States?

(3) Does the circular mentioned and set forth in the first and second counts of the indictment herein constitute a "list of the drawings at any lottery or similar scheme" within the meaning of section thirty-eight hundred and ninty-four of the Revised Statutes of the United States?

ARGUMENT.

FIRST QUESTION.

The first question makes it necessary to determine whether the bonds mentioned and described in the indictment represent a "lottery or similar scheme" within the meaning of section 3894, Revised Statutes.

It must be presumed that Congress used the word "lottery" in section 3894 in its usual sense, there being nothing in the act to show otherwise.

Turning now to, perhaps, the best English dictionary, "The Century," we find the following full definition of the term lottery:

> A scheme for raising money by selling chances to share in a distribution of prizes; more specifically, a scheme for the distribution of prizes by chance among persons purchasing tickets, the correspondingly numbered slips, or lots, representing prizes or blanks, being drawn from a wheel on a day previously announced in connection with the scheme of intended prizes. In law the term *lottery* embraces all schemes for the distribution of prizes by chance, such as policy-playing, gift-exhibitions, prize-concerts, raffles at fairs, etc., and includes various forms of gambling. Most of the governments of the continent of Europe have at different periods raised money for public purposes by means of lotteries; and a small sum was raised in America during the Revolution by a lottery authorized by the Continental Congress. Both state and private lotteries have been forbidden by law in Great Britain and in nearly all of the United States, Louisiana and Kentucky being the two notable exceptions.

Applying now the common understanding of "lottery," as mirrored in this definition, to the facts of this case as they appear in the indictment, it is difficult to escape the conclusion that the circular put into the mail by the defendant had a direct reference to a lottery.

It is true, the lottery referred to is a fiscal instrumentality of the Austrian Government, but that or any other use of the lottery can not change "the stamp of nature." It is one and the same thing under all sanctions and in all circumstances.

The great historian of England under William of Orange calls things by their right names in his account of the numerous shifts of Parliament to replenish the depleted exchequer. He says:

> But, notwithstanding all these expedients, there was still a large deficiency; and it was again necessary to borrow. A new duty on salt and some other imposts of less importance were set apart to form a fund for a loan. On the security of this fund a million was to be raised by a lottery, but a lottery which had scarcely anything but the name in common

with the lotteries of a later period. The sum to be contributed was divided into a hundred thousand shares of ten pounds each. The interest on each share was to be twenty shillings annually, or, in other words, ten per cent, during sixteen years. *But ten per cent for sixteen years was not a bait which was likely to attract lenders. An additional lure was therefore held out to capitalists. On one-fortieth of the shares much higher interest was to be paid than on the other thirty-nine fortieths. Which of the shares should be prizes was to be determined by lot.* The arrangements for the drawing of the tickets were made by an adventurer of the name of Neale, who, after squandering away two fortunes, had been glad to become groom-porter at the palace. (Macaulay's History of England, Vol. IV, pp. 441, 442, Ed. 1860, by Harper & Brothers.)

The same story, *mutato nomine*, is applicable to the Austrian plan as described on the back of each of the "premium bonds."

Austria must put money into her treasury. But her unassisted credit was, evidently, not sufficient to make her project of a loan *take* with sufficient readiness, so she determined to eke out her credit by an appeal to the cupidity and gambling propensity of mankind.

She says, lend me 100 florins; you will not lose. If your bond is called in the first year you will get 135 florins, or if in some subsequent year, 5 florins will be added to the 135 for each additional year after the first. That much is *assured*, but you also have, *as part of your "premium bond,"* a chance to receive satisfaction by drawing some one of the glittering prizes offered as the bait to make the imperial loan a success. Thus, during the first year, each of the bondholders had an equal chance of drawing the prizes of 250,000, or 25,000, or 15,000, or 10,000 gulden or florins, besides other tempting prizes.

What then is the purchase of a "premium bond" but a purchase of a chance in a lottery, whatever else it may be?

The fact that the premium bond imports a debt to be paid with some accretion, as recompense for a longer or

shorter forbearance, as chance may determine, does not make the prize feature of the "premium bond"—which feature may be called the mainspring of the loan project—any the less a lottery, or "a scheme for raising money by selling chances to share in a distribution of prizes."

If this court should say that the indictment does not set forth a lottery scheme, because the scheme therein described has an element of certainty in it, the door will be thrown wide open for evasion in every direction, and the law will become a dead letter.

If this imperial scheme does not include a lottery because it has an element of certainty, also, there exists a surprising inconsistency in the law, in that it is made to extend to the so-called gift concert, which also has an element of certainty, namely, the concert, and an element of chance, in respect of the gift feature. Not only so, but the statute extends to any "other *similar enterprise offering prizes.*" If, then, the Austrian scheme is not a lottery, in the strict sense, is it not, at least, an enterprise *similar to a lottery?*

Is it a reasonable reading of the statute to say that an enterprise which has the elements of a lottery is, nevertheless, not such because it is the adjunct of something else which is lawful? "This *species of gaming,*" says the Imperial Dictionary (*voc.* Lottery), "has been resorted to at different periods by most of the European governments as a means of raising money for public purposes." It is quite fair to presume that the lexicographer, in making this definition, had in contemplation this Austrian scheme, among others, and that he intended to characterize it as a "species of gaming."

When lotteries and all *similar enterprises* are forbidden the mails we have *the authority of the statute itself* for saying that the term lottery is used in its broadest sense. The prohibition of everything *in the similitude of a lottery* necessitates the conclusion that the case described in the indictment is directly within the statute. To refuse to give the statute the broad meaning which it demands is to nullify the will of Congress, partially.

In the case of *United States* v. *Zeisler* (30 Fed. Rep., 499), which presented the identical question now under discussion, Judge Blodgett held that a circular concerning the prize feature of bonds of the city of Vienna representing a loan to that city, and issued on the same plan as the bonds in question here, was unlawfully deposited in the mails by the defendant, who was convicted and sentenced to pay a fine.

In passing upon the motion for a new trial in that case, the learned judge made some observations so apposite to this case that we reproduce them here. He said:

> If these drawings determined only the time when these bonds would be paid, I should say that the mere determining of that time by lot or drawing would not give them the characteristics of a lottery; but when a city or a government, in order to make an inducement for people to buy their bonds, holds out large prizes to be drawn by chance, or determined by lot in the manner in which prizes are usually determined in an even honestly conducted lottery, it seems to me it comes clearly and distinctly within the inhibiting clause of the statute under which this indictment is found. The mere reading of one of these bonds, and the drawing plan annexed to it, which is put in evidence, shows that it was the intention to stimulate the sale of the bonds by these large prizes, which were to be determined at every drawing, and which every holder of a bond had the chance of obtaining; and hence it seems to me that the purpose of the scheme was not only to determine by lot when the bonds should be paid, but also to determine certain extraordinary chances to the holders of the fortunate numbers drawn. The mere fact that these bonds are authorized by the law of a foreign country, and sanctioned by the policy of such country, does not, as it seems to me, in the least degree affect the question in this case. In *Governors of the Almshouse, etc.*, v. *American Art Union*, 7 N. Y., 228, a lottery was defined to be "a scheme for the distribution of prizes by chance;" and the same definition is given in *Thomas* v. *People*, 59 Ill., 160, and *Dunn* v. *People*, 40 Ill., 465.
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> The bonds in question certainly involved a lottery, within the meaning

> of the cases I have cited, and many more to the same effect might also be quoted. The circular sent through the mail was intended to induce persons to purchase and deal in these bonds with the hope of becoming the lucky winners of some of the high prizes to be distributed at each drawing; and the fact that the purchasers of the bonds were, by the drawing plan, to get back their principal, and in the aggregate what is equivalent to a very small rate of interest upon that principal, does not, as it seems to me, change the character of the transaction or relieve it from the characteristic features of a lottery; that is, that high prizes out of all due proportion to the amount of money paid for a bond were to be drawn for and distributed by chance among the holders of these bonds, in the same manner as the prizes are determined in an ordinary lottery (pp. 500, 501).

In *Ballock* v. *State* (73 Md., 1) the court of appeals held that the selling of these Austrian bonds was a violation of the Maryland anti-lottery law. The court declined to countenance the idea that a lottery carried on under Imperial auspices and for governmental purposes is different from any other lottery. They said:

> It is true that Austrian Government bonds are vendible and ought to be treated as other articles of commerce, as a rule; but when those bonds are coupled with conditions and stipulations which change their character from simple government bonds for the payment of a certain sum of money to a species of lottery ticket which falls under the condemnation of our statutes, it must be classed as its conditions characterize it, and then it is not vendible under our law, and it does not violate constitutional provision or treaty stipulation to so hold (p. 8).

The reverse of these cases was flatly held by the court of appeals of New York, in *Kohn* v. *Koehler* (96 N. Y., 362), and by the supreme court of California, in *ex parte* Shobert (70 Cal., 632), following it, but upon reasoning that is hardly satisfactory, as applied to this case, if we may presume to say so.

The case of *Kohn* v. *Koehler*, was a *qui tam* action on the State statute for the suppression of lotteries to recover the penalty provided for informers. The particular offense was a sale by the defendant to the plaintiff of one of these Austrian bonds, on the ground that it represented a share or interest in an "*illegal lottery*," the offense at which the State statute was aimed being, it will be noted, not *any* lottery, but any "*illegal*" lottery.

The court held that, the fact being that the *bonds* were payable in any event, with some accretion, the prize feature incidental to them did not make them lottery tickets, and went so far as to liken the prize feature of the scheme to the ups and downs and fluctuations of the stock market.

There is no true analogy, however, between the chances and uncertainties produced by the laws of trade and the chances and uncertainties created for *the very purpose* of tempting the cupidity and gambling propensity of man and deriving a benefit therefrom.

The learned court seemed to think that the high public end of the Austrian scheme sanctified all the means employed to obtain it.

Upon the reasoning of this case, it would seem that auctions or any other business might be safely carried on with a lottery appendage to attract people, for the chance of driving trade with them while waiting for the turn of fortune's wheel.

Again, should it once be held that the Austrian scheme is not a lottery, because there are no *blanks* in it, it would open the way for widespread evasion and demoralization. It can not be that a scheme that promises *something* to everyone who embarks in it and fails to win one of the valuable prizes that constitute its real danger and temptation, is any the less a lottery for that.

It is to be remembered that, as the act of Congress originally stood, it was only "*illegal lotteries*" that were excluded from the mail (17 Stat., 302, § 149). But the term "lottery" is now without the qualification of its former predicate "illegal," which Congress has seen fit to drop. Is there not significance in that change in the law?

Now *any and every lottery*, whether good, bad, or indifferent, is forbidden the mails, and there seems no escape from the conclusion that the interdict of the law allows no exception.

It is the presence of the word "illegal," as the attributive of lottery, in the New York law that, perhaps, accounts for the reasoning of the court of appeals in the case cited. If the laws of New York recognize two classes of lotteries, legal and illegal, it might possibly be that this Austrian lottery would come under the former class. But, as we have seen, the Federal law excluding lotteries from the mails deals in no such distinction, but excludes lotteries of every description. It does not follow that the court of appeals would have made a similar decision if section 3894 (R. S.) had been before it for interpretation.

SECOND AND THIRD QUESTIONS.

If our argument is valid as to the first question, it seems to follow that the other two must be answered in the affirmative also. Indeed, we do not perceive that any argument is submitted on the second and third questions by the counsel for the plaintiff in error.

It is manifest that if the Austrian scheme is a lottery, the circular in question concerns, that is, relates or belongs to, a lottery, and also contains a list of the drawings of that lottery.

Respectfully submitted.

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